

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35948

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 680
	)	
Plaintiff-Respondent,	)	Filed: November 18, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
GARY JOSEPH McDONNELL,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Third Judicial District, State of Idaho, Adams County. Hon. Stephen W. Drescher, District Judge.

Judgments of conviction for hunting or killing a deer without a valid tag and possessing an unlawfully killed deer, affirmed.

Felton Law, Timothy L. Felton, Weiser, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

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GRATTON, Judge

Gary Joseph McDonnell appeals his judgments of conviction, entered upon a jury verdict, for hunting or killing a deer without a valid tag and possessing an unlawfully killed deer. For the reasons set forth below, we affirm.

I.

**FACTUAL AND PROCEDURAL BACKGROUND**

McDonnell was found guilty, upon jury verdict, of hunting or taking a deer without a valid tag, Idaho Code § 36-409(c), and possession of an unlawfully killed deer, I.C. § 36-502(b). McDonnell claims that his convictions were based solely upon uncorroborated accomplice testimony, a violation of I.C. § 19-2117.

## II. ANALYSIS

McDonnell claims that insufficient evidence exists to support his convictions because the convictions are based solely on the uncorroborated testimony of an accomplice.<sup>1</sup>

Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991). We will not substitute our view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985). Moreover, we will consider the evidence in the light most favorable to the prosecution. *Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

Regarding accomplice testimony, I.C. § 19-2117, provides:

A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

This statutory corroboration requirement is intended to protect against the danger that an accomplice may wholly fabricate testimony, incriminating an innocent defendant in order to win more favorable treatment for the accomplice. *Matthews v. State*, 136 Idaho 46, 49, 28 P.3d 387, 390 (Ct. App. 2001).

An accomplice is a person involved in the commission of a crime, whether he or she participates directly or indirectly. To be an accomplice, it is sufficient to aid and abet, advise, or encourage the commission of the crime. *State v. Chacon*, 145 Idaho 814, 818-819, 186 P.3d 670,

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<sup>1</sup> McDonnell also contends that the district court erred in denying his motion for acquittal at the close of the State's case. McDonnell waived his right to appellate review of the district court's ruling by presenting his own evidence in his case in chief; therefore we review all of the evidence presented at trial for sufficiency. *State v. Brown*, 131 Idaho 61, 71, 951 P.2d 1288, 1298 (Ct. App. 1998).

674-675 (Ct. App. 2008)(citing *State v. Ruiz*, 115 Idaho 12, 16, 764 P.2d 89, 93 (Ct. App. 1988); I.C. §§ 18-204, 19-1430. As an accomplice, one must intend to promote or assist in the commission of a crime and mere presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not, in the absence of a duty to act, sufficient to make one an accomplice. Idaho Criminal Jury Instruction 313.

An accomplice's testimony is only allowed if "other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." I.C. § 19-2117. The evidence need not "be sufficient to sustain a conviction on its own, nor must it corroborate every detail of the accomplice's testimony." *State v. Mitchell*, 146 Idaho 378, 382, 195 P.3d 737, 741 (Ct. App. 2008). The corroborating evidence may be slight, need only go to one material fact, and may be entirely circumstantial. *Id.* In addition, statements attributable to the defendant may serve as the necessary corroboration. *Id.* at 382-383, 195 P.3d at 741-742. The corroborating evidence is sufficient if it tends to connect the defendant to the crime independent of the accomplice's testimony. *State v. Aragon*, 107 Idaho 358, 364, 690 P.2d 293, 299 (1984).

State's witness James Fowler testified that he and McDonnell hunted in Adams County in October of 2005. Fowler testified that McDonnell shot a doe deer from the road. He testified that McDonnell then retrieved the deer as Fowler turned his truck around. The two men then loaded the deer into Fowler's truck and returned to McDonnell's camp. Fowler testified that McDonnell did not place a tag on the deer before returning to camp. Fowler was camped some distance away from McDonnell and never saw the deer again. In specific regard to the question of whether McDonnell had a tag for the deer, Fowler testified:

- Q. Mr. Fowler, with respect to any tag that the defendant had or didn't have with respect to that doe deer, could you tell the jury what your knowledge is about that, please.
- A. About - could you repeat that?
- Q. I say with respect to any tag -
- A. Oh, Okay.
- Q. - did Mr. - did the defendant tag the deer with a tag?
- A. Right. No. No.
- Q. And did you talk to him about a tag, sir?
- A. No, I didn't. I didn't think anything about it.

McDonnell contends that Fowler was an accomplice and, therefore, his testimony had to be corroborated but was not. We turn to the question of whether the evidence supports a determination that Fowler was an accomplice.

McDonnell was charged with and tried for several crimes involving the doe deer as well as an elk. However, as noted, this appeal involves only his conviction for hunting or taking the deer without a valid tag, I.C. § 36-409(c), and possession of the unlawfully killed deer, I.C. § 36-502(b). Fowler did not testify as to any knowledge of whether McDonnell did or did not have a tag, only that McDonnell did not place a tag on the deer prior to the return to camp. No evidence exists in the record that Fowler knew McDonnell did not have a tag for the deer and, thus, it cannot be said that he intended to promote or assist in the commission of the crimes of killing a deer without a tag or the possession of the deer killed unlawfully because it was killed by a person without a tag. To hold otherwise would mean that all members of a hunting party would be accomplices to the crimes of one of their party who shot and possessed a deer without a tag, even though the other members did not know that party did not have a tag.

We note that Fowler was charged with and pled guilty to some crime relative to the incident involving the deer. The specific crime to which Fowler pled is not revealed in the record. Reference is made to the crime in the record variously as involved with the “taking” of the deer or the “transportation” of the deer. Without evidence of the precise crime to which Fowler pled guilty we cannot infer additional facts of knowledge by Fowler that the deer was killed or possessed illegally by McDonnell because he did not have a tag.

### **III.**

#### **CONCLUSION**

There exists no substantial evidence in the record to support a determination that Fowler was an accomplice to McDonnell based upon the specific crimes charged. Thus, I.C. § 19-2117 is inapplicable and corroboration of Fowler’s testimony was not necessary. Therefore, McDonnell’s judgment of conviction is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**